

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4)
5 MUR 7129) DISMISSAL AND
6 Committee to Elect Tom O'Malley) CASE CLOSURE UNDER THE
7 and John Griffin, as treasurer) ENFORCEMENT PRIORITY
8 Brad Winegard) SYSTEM
9)
10)

11 **GENERAL COUNSEL'S REPORT**

12 Under the Enforcement Priority System, the Commission uses formal scoring criteria as a
13 basis to allocate its resources and decide which matters to pursue. These criteria include, without
14 limitation, an assessment of the following factors: (1) the gravity of the alleged violation, taking into
15 account both the type of activity and the amount in violation; (2) the apparent impact the alleged
16 violation may have had on the electoral process; (3) the complexity of the legal issues raised in the
17 matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as
18 amended (the "Act"), and developments of the law. It is the Commission's policy that pursuing
19 relatively low-rated matters on the Enforcement docket warrants the exercise of its prosecutorial
20 discretion to dismiss cases under certain circumstances.

21 The Office of General Counsel has scored MUR 7129 as a low-rated matter and has
22 determined that it should not be referred to the Alternative Dispute Resolution Office.¹ For the
23 reasons set forth below, we recommend that the Commission dismiss the allegations that Committee
24 to Elect Tom O'Malley and John Griffin in his official capacity as treasurer (the "Committee")², and
25 Brad Winegard violated the Act or Commission regulations.

26 The Complaint alleges that a statement posted on the Committee's website solicited
27 anonymous \$200 cash contributions in envelopes with no return addresses, addressing potential

¹ The EPS rating information is as follows:
September 7, 2016.

Complaint Filed: August 22, 2016. Response Filed:

² O'Malley, a 2016 candidate for the Massachusetts 9th Congressional District, lost in the September 8, 2016, Republican primary with 38% of the vote.

1 supporters who were “still subject to the [H]atch [A]ct.”³ Compl. at 1. The Complaint alleges that a
2 supporter, not the candidate, likely wrote the statement, and the Committee’s website displayed it for
3 months.⁴ *Id.* The statement also includes a request for \$100 contributions to O’Malley: “[t]he
4 Challenge is from me personally and is \$100 from every member in this room.” Compl., Attach. at
5 1.

6 O’Malley concedes he should have removed “the Hatch Act comment” before posting the
7 statement on the Committee’s website, but explains that the statement was an endorsement from a
8 former colleague, Respondent Brad Winegard, that was initially placed on a private social media
9 page. Resp. at 1. Further, the Committee states that the request for cash donations was meant to be
10 sarcastic, and the Committee’s failure to remove it was an oversight. *Id.* The Committee states it
11 did not intend to solicit, nor did it accept, any cash donations. *Id.* The Response includes a letter
12 from Winegard, who explains that he meant the statement to be satirical and directed only to a
13 private social media group, he “do[es] not solicit funds for anything,” and he only sought “prayers
14 and moral support” for O’Malley. *Id.* at 2.

15 The Federal Election Campaign Act of 1971, as amended (“the Act”) and Commission
16 regulations state that no person shall make contributions to a candidate for federal office of currency
17 of the United States, or of any foreign country, which in the aggregate exceed \$100.⁵ Commission
18 regulations further require a candidate or committee receiving an anonymous cash contribution in

³ The statement reads “For those still subject to the [H]atch [A]ct sticking a couple Franklins in an envelope with no return address is also legit.” Compl. at 1, Attach. at 2. This statement follows the mail and online addresses for the Committee. The Complaint provides the campaign website, <http://www.omalleyforcongress.com/endorsements>. This URL no longer links to the campaign website, however the page is viewable via the Internet Archive: <https://web.archive.org/web/20160818204418/http://www.omalleyforcongress.com:80/endorsements>.

⁴ The Complaint named Lieutenant Colonel David G. Bolgiano as the supporter who wrote the statement, and the printout attached to the Complaint is somewhat ambiguous: the names “Barefoot Boatswain and Folais Casteal” are displayed above the statement, and Bolgiano’s name is displayed below it. However, Respondents state that Senior Chief Petty Officer Brad Winegard wrote the statement and attach Winegard’s letter claiming responsibility.

⁵ 52 U.S.C. § 30123; 11 C.F.R. § 110.4(c)(1).

1 excess of \$50 to promptly dispose of the amount over \$50.⁶ The Act and the Commission's
2 regulations prohibit federal candidates and their agents from soliciting funds that do not comply with
3 the Act's prohibitions, limitations, and reporting requirements.⁷ The Commission's regulations
4 define "solicit" broadly as "to ask, request, or recommend, explicitly or implicitly, that another
5 person make a contribution, donation, transfer of funds, or otherwise provide anything of value," and
6 states that the communication should be "construed as reasonably understood in the context in which
7 it is made"⁸ This test is objective and does not turn on the subjective interpretations of the
8 speaker or the recipients.⁹ The Commission explained that its objective standard "hinges on whether
9 the recipient should have reasonably understood that a solicitation was made," and further explained
10 that "words that would by their plain meaning normally be understood as a solicitation, may not be a
11 solicitation when considered in context."¹⁰

12 The Commission has recognized that a request for money that is made in jest is not a
13 solicitation.¹¹ The Committee maintains that the comment regarding anonymous cash donations was
14 a sarcastic joke made by a friend and not meant to be understood as a solicitation. The friend
15 provided a signed letter supporting that contention, and the Committee states that its failure to
16 remove that statement from the endorsement was unintended. The Committee states, and its reports
17 reflect, that it did not accept any cash contributions.¹²

⁶ 11 C.F.R. § 110.4(c)(3).

⁷ 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61.

⁸ 11 C.F.R. § 300.2(m).

⁹ *Id.*, see also Definitions of "Solicit" and "Direct"; Final Rule; 71 Fed. Reg. 13926-02, 13928 (March 20, 2006).

¹⁰ 71 Fed. Reg. 13929.

¹¹ See Factual and Legal Analysis at 6-7, MUR 6939 (Mike Huckabee, *et al.*).

¹² The Committee's FEC filings do not indicate that the Committee received any cash contributions. See Committee to Elect Tom O'Malley 2016 April Quarterly Report, filed March 30, 2016; Committee to Elect Tom

1 Based on seemingly contradictory information in the record, it is not clear whether
2 Winegard's suggestion that readers put \$200 in an unmarked envelope was meant as sarcasm. In
3 Winegard's endorsement on the website, he clearly solicits \$100 contributions, but in the Response,
4 he states that he does not solicit funds. However, because the Committee's reports do not reveal any
5 cash contributions, the Committee admits that it should not have posted Winegard's statement
6 regarding anonymous cash contributions, and the amounts requested were somewhat modest,¹³ we
7 recommend that the Commission dismiss the allegations consistent with the Commission's
8 prosecutorial discretion to determine the proper ordering of its priorities and use of agency
9 resources. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). We also recommend that the
10 Commission approve the attached Factual and Legal Analysis, close the file as to all respondents and
11 send the appropriate letters.

12 13 RECOMMENDATIONS

- 14
- 15 1. Dismiss the allegations that Committee to Elect Tom O'Malley and John Griffin in his
16 official capacity as treasurer, and Brad Winegard, violated the Act and Commission
17 regulations, pursuant to the Commission's prosecutorial discretion under *Heckler*
18 *v. Chaney*, 470 U.S. 821 (1985);
19
 - 20 2. Approve the attached Factual and Legal Analysis and the appropriate letters; and
21
 - 22 3. Close the file as to all respondents.
23

24 Lisa J. Stevenson
25 General Counsel

26
27
28 Kathleen M. Guith
29 Associate General Counsel
30

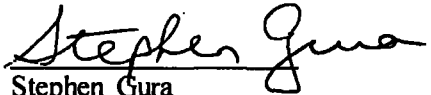
O'Malley 2016 July Quarterly Report, filed June 30, 2016; Committee to Elect Tom O'Malley 2016 Pre-Primary Report, filed September 7, 2016; Committee to Elect Tom O'Malley 2016 October Quarterly Report, filed October 14, 2016.


¹³ In comparison, the request in MUR 6939 that the Commission found to be in jest was for a million dollars.

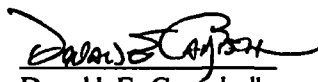
10.10.17

Date

BY:


Stephen Gura
Deputy Associate General Counsel


Jeff S. Jordan
Assistant General Counsel


Donald E. Campbell
Attorney

Attachment:
Factual and Legal Analysis

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Committee to Elect Tom O'Malley, MUR 7129
and John Griffin, as treasurer
(collectively "the Committee")

I. INTRODUCTION

This matter was generated by a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations by Committee to Elect Tom O'Malley and John Griffin in his official capacity as treasurer (the "Committee"),¹ and Brad Winegard. It was scored as a low-rated matter under the Enforcement Priority System, by which the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The Complaint alleges that a statement posted on the Committee's website solicited anonymous \$200 cash contributions in envelopes with no return addresses, addressing potential supporters who were "still subject to the [H]atch [A]ct."² Compl. at 1. The Complaint alleges that a supporter, not the candidate, likely wrote the statement, and the Committee's website displayed it for months.³ *Id.* The statement also includes a request for \$100 contributions to

¹ O'Malley, a 2016 candidate for the Massachusetts 9th Congressional District, lost in the September 8, 2016, Republican primary with 38% of the vote.

² The statement reads "For those still subject to the [H]atch [A]ct sticking a couple Franklins in an envelope with no return address is also legit." Compl. at 1, Attach. at 2. This statement follows the mail and online addresses for the Committee. The Complaint provides the campaign website, <http://www.omalleyforcongress.com/endorsements>. This URL no longer links to the campaign website, however the page is viewable via the Internet Archive: <https://web.archive.org/web/20160818204418/http://www.omalleyforcongress.com:80/endorsements>.

³ The Complaint named Lieutenant Colonel David G. Bolgiano as the supporter who wrote the statement, and the printout attached to the Complaint is somewhat ambiguous: the names "Barefoot Boatswain and Folais

1 O'Malley: "[t]he Challenge is from me personally and is \$100 from every member in this
2 room." Compl., Attach. at 1.

3 O'Malley concedes he should have removed "the Hatch Act comment" before posting
4 the statement on the Committee's website, but explains that the statement was an endorsement
5 from a former colleague, Respondent Brad Winegard, that was initially placed on a private
6 social media page. Resp. at 1. Further, the Committee states that the request for cash donations
7 was meant to be sarcastic, and the Committee's failure to remove it was an oversight. *Id.* The
8 Committee states it did not intend to solicit, nor did it accept, any cash donations. *Id.* The
9 Response includes a letter from Winegard, who explains that he meant the statement to be
10 satirical and directed only to a private social media group, he "do[es] not solicit funds for
11 anything," and he only sought "prayers and moral support" for O'Malley. *Id.* at 2.

12 **B. Legal Analysis**

13 The Federal Election Campaign Act of 1971, as amended ("the Act") and Commission
14 regulations state that no person shall make contributions to a candidate for federal office of
15 currency of the United States, or of any foreign country, which in the aggregate exceed \$100.⁴
16 Commission regulations further require a candidate or committee receiving an anonymous cash
17 contribution in excess of \$50 to promptly dispose of the amount over \$50.⁵ The Act and the
18 Commission's regulations prohibit federal candidates and their agents from soliciting funds that
19 do not comply with the Act's prohibitions, limitations, and reporting requirements.⁶ The

Casteal" are displayed above the statement, and Bolgiano's name is displayed below it. However, Respondents state that Senior Chief Petty Officer Brad Winegard wrote the statement and attach Winegard's letter claiming responsibility.

⁴ 52 U.S.C. § 30123; 11 C.F.R. § 110.4(c)(1).

⁵ 11 C.F.R. § 110.4(c)(3).

⁶ 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61.

1 Commission's regulations define "solicit" broadly as "to ask, request, or recommend, explicitly
2 or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise
3 provide anything of value," and states that the communication should be "construed as
4 reasonably understood in the context in which it is made"⁷ This test is objective and does not
5 turn on the subjective interpretations of the speaker or the recipients.⁸ The Commission
6 explained that its objective standard "hinges on whether the recipient should have reasonably
7 understood that a solicitation was made," and further explained that "words that would by their
8 plain meaning normally be understood as a solicitation, may not be a solicitation when
9 considered in context."⁹

10 The Commission has recognized that a request for money that is made in jest is not a
11 solicitation.¹⁰ The Committee maintains that the comment regarding anonymous cash donations
12 was a sarcastic joke made by a friend and not meant to be understood as a solicitation. The
13 friend provided a signed letter supporting that contention, and the Committee states that its
14 failure to remove that statement from the endorsement was unintended. The Committee states,
15 and its reports reflect, that it did not accept any cash contributions.¹¹

16 Based on seemingly contradictory information in the record, it is not clear whether
17 Winegard's suggestion that readers put \$200 in an unmarked envelope was meant as sarcasm. In

⁷ 11 C.F.R. § 300.2(m).

⁸ *Id.*, see also Definitions of "Solicit" and "Direct"; Final Rule; 71 Fed. Reg. 13926-02, 13928 (March 20, 2006).

⁹ 71 Fed. Reg. 13929.

¹⁰ See Factual and Legal Analysis at 6-7, MUR 6939 (Mike Huckabee, *et al.*).

¹¹ The Committee's FEC filings do not indicate that the Committee received any cash contributions. See Committee to Elect Tom O'Malley 2016 April Quarterly Report, filed March 30, 2016; Committee to Elect Tom O'Malley 2016 July Quarterly Report, filed June 30, 2016; Committee to Elect Tom O'Malley 2016 Pre-Primary Report, filed September 7, 2016; Committee to Elect Tom O'Malley 2016 October Quarterly Report, filed October 14, 2016.

1 Winegard's endorsement on the website, he clearly solicits \$100 contributions, but in the
2 Response, he states that he does not solicit funds. However, because the Committee's reports do
3 not reveal any cash contributions, the Committee admits that it should not have posted
4 Winegard's statement regarding anonymous cash contributions, and the amounts requested were
5 somewhat modest,¹² the Commission dismisses the allegations consistent with the Commission's
6 prosecutorial discretion to determine the proper ordering of its priorities and use of agency
7 resources. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

¹² In comparison, the request in MUR 6939 that the Commission found to be in jest was for a million dollars.